IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

WEDNESDAY, THE 5TH SEPTEMBER 2007 / 14TH BHADRA 1929

OP.No. 38521 of 2002(J)

PETITIONER:

T.K.NARAYANAN, HEADMASTER,
B.E.M.L.P. SCHOOL, PAYYANNUR, KANNUR DISTRICT.

BY ADV. SRI.KALEESWARAM RAJ

RESPONDENTS:

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1. STATE OF KERALA,
REPRESENTED BY SECRETARY TO GOVERNMENT,
DEPARTMENT OF GENERAL EDUCATION,
THIRUVANANTHAPURAM.

2. THE ASSISTANT EDUCATIONAL OFFICER,
PAYYANNUR.

3. THE ACCOUNTANT GENERAL,
OFFICE OF THE ACCOUNTANT GENERAL (A & E),
THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI. T.T. MUHAMMED.

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 05/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

O.P. 38521/2002.

APPENDIX

PETITIONER'S EXTS:

EXT. P1 : TRUE COPY OF THE STATEMEMT OF FIXATION OF PAY IN RESPECT OF THE PETITIONER.

EXT. P2 : TRUE COPY OF THE RELEVANT PART OF THE OBJECTION RAISED BY THE OFFICERS UNDER THE 3RD RESPONDENT.

EXT. P3 : TRUE COPY OF THE ORDER NO.A.3331/99 DATED 20.12.1999 ISSUED BY THE 2ND RESPONDENT.

EXT. P4 : TRUE COPY OF THE REPRESETNATION DATED 10.5.1999 FILED BY THE PETITIONER BEFORE THE 3RD RESPONDENT.

EXT. P5 : TRUE COPY OF THE REPRESENTATION DATED 18/2/2000 FILED BY THE PETITIONER BEFORE THE 1ST RESPONDENT.

EXT. P6 : TRUE COPY OF THE LETTER NO.20026/P3 DATED 8.8.2001.

EXT. P7 : TRUE PHOTO COPY OF THE LETTER NO.4602/97 DATED 18.11.2002 ISSUED BY THE 2ND RESPONDENT.

EXT. P8 : TRUE COPY OF THE G.O.(P) 517/88 DATED 8.8.1988.

EXT. P9 : TRUE COPY OF THE GOVERNMENT LETTER NO.48172/J2/90/G.EDN. DATED 22.9.1990.

K.M.JOSEPH, J.

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O.P. No. 38521 OF 2002

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Dated this the 5th day of September, 2007

JUDGMENT

Case of the petitioner in brief is as follows:

Petitioner is working as Headmaster of a L.P.School. He had continuous service from 1.8.1974. Before that he had various spells of broken periods of service, which are indicated. It included provisional service in Government Schools (selection from employment exchange consisting of two years and four months and five days besides aided School service between 4.9.1973 and 30.7.1974. His aided School service consisted of six months and 15 days between 4.9.1973 and 30.7.1974. He was promoted as Headmaster with effect from 28.5.1987. The pay of Headmaster was allowed on completion of 15 years continuous service with effect from 1.8.1989. The audit party by Ext.P2 objected to the fixation of petitioner's pay stating that there was a premature grant of higher grade and that the provisional service in Government Schools is not to be reckoned while fixing the pay. Ext.P3 was issued consequent upon Ext.P2 by the second respondent. Petitioner filed Ext.P4 representation before the third respondent and

Ext.P5 before the first respondent. Ext.P6 is issued by the first respondent rejecting the representation. On following Exts.P2, P3 and P6 the second respondent has issued Ext.P7. Petitioner challenges Exts.P2, P3, P6 and P7 and seeks a direction to the respondents to refrain from reducing or re-fixing petitioner's pay on the basis of Exts.P2, P3, P6 and P7. Petitioner relies on Ext.P8 under which Government has clarified that in the case of teachers also provisional service will be reckoned as qualifying service for the purpose of time bound promotion subject to Government decision No.2 under Rule 33 of Part I KSR. Ext.P8 is dated 8.8.1988. Ext.P9 is a Government letter dated 22.9.1990, as per which according to the petitioner it applies to the aided Schools also. Petitioner relies on the decisions reported in **Satyapalan v. Deputy Director of Education** (1998(1) K.L.T. 399), **Sukumaran Nair v. State of Kerala** (2000 (3) K.L.T. SN, Case No.30) and **John v. Kerala State Road Transport Corporation** (2003(2) K.L.T. SN, Case No.11) to contend that even assuming for a moment that there was an error, there was misrepresentation on the part of the petitioner. In this regard he also relies on the decisions reported

in **Sahib Ram v. State of Haryana** (1995 Supp (1) SCC 18), **John v. Kerala State Road Transport Corporation** (2003(2) K.L.T. SN, Case No.11), **Jayasree. P. v. State of Kerala** (2003(1) ILR 131), **Roy v. United India Insurance Co**. (2002(2) K.L.T. 100), **Shyam Babu Verma v. Union of India**((1994) 2 SCC 521), **Sivankutty Nair v. Secretary to Government** (2005(3) K.L.T. 512). He seeks to distinguish the decision reported in **Naseem Ahmad v. State of U.P**. (2006(1) K.L.T. SN 88, Case No.126), **State of Kerala v. Saiful Islam** (2006(1) K.L.T. 619) also by referring to the decision reported in **Krishnakumar S.P. v. Guruvayoor Devaswam** (2007 (1) ILR, Ker. 699).

2. Counter affidavit is filed wherein the contentions based on the impugned orders are reiterated.

3. The first question to the considered is whether petitioner is right in contending that provisional service rendered in Government Schools is to be reckoned for calculating the qualifying period for the grant of grade in favour of an aided school teacher. In fact petitioner relies on Ext. P8 dated 8.8.1988. It provides that provisional service

would be reckoned as qualifying service for time bound promotion, but it is subject to the restriction in Government decision No.2 under Rule 33 of Part I KSR. By Ext.P9 dated 22.9.1990 it is stated that the benefit of Ext.P8 is applicable to aided School teachers also. However, as correctly pointed out by the learned Government Pleader in terms of Government Decision No.2 under Rule 33 of Part I KSR the method of appointment of teachers in Government Schools and aided Schools are not identical. In such circumstances, the provisional service rendered by the petitioner in the Government School cannot count as qualifying service for time bound higher grade in aided schools. Therefore the notional higher grade granted to the petitioner by reckoning his prior provisional service in Government School was clearly illegal.

4. Learned counsel for the petitioner cited the decision of a learned Single Judge reported in **Rajendran v. State of Kerala** (2004 (3) K.L.T. 533). He also brought to my notice the decision reported in **J. Ambujakshy v. State of Kerala** (2002(2) ILR, Ker. 228) and he further submitted that noticing a conflict between the same the matter was referred to a Division Bench. The Division Bench in its judgment

in O.P. 322 of 2001 proceeded to take the view that there is no conflict between the said decisions. It also held that it is not considering the correctness of the decision in **Rajendran's Case.** In such circumstances, having regard to the facts of this case I am of the view that the objection against counting the provisional service of the petitioner in Government Schools for the grant of time bound promotion is perfectly valid.

5. The further question raised by the learned counsel for the petitioner is that even proceeding on the basis that the audit objection is valid, the recovery of the amounts may not be sustained. It is his contention that amount was fixed without misrepresentation or fraud on the part of the petitioner and after having fixed the amount and after having paid the amount it is not fair or legal to recover the amount. It is in this regard petitioner has relied on large number of decisions. According to him, this court in **Satyapalan's Case** took the view that the petitioners were not at fault in granting the increment, and it would be arbitrary to mulct the petitioners with the liability to refund the amount which had been obtained by a wrong fixation made by the

authority. Thereafter the said judgment was followed in **Sukumaran Nair's Case**, **John's Case, Jayasree.P.'s Case, Roy's Case** and **Sivankutty Nair's Case.** No doubt there is no dispute that the decision in **Sivankutty Nair's Case** came to be overruled by a Division Bench in the decision reported in **Santhakumari v. State of Kerala** (2005(4) K.L.T. 649). Further a Division Bench speaking through Justice M.Ramachandran in **State of Kerala v. Saiful Islam** (2006(1) K.L.T. 619) took a slightly different view. According to the learned counsel for the petitioner in taking the said view, the Division Bench has not referred to the decision of the Apex Court in **Sahib Ram's Case**. He would further submit that in fact in a still later Division Bench speaking again through Justice M.Ramachandran, (**Krishna Kumar's Case**) this Court has taken a different view. In the light of this state of law he would contend that the recovery of the amounts already paid may be restrained with reference to the decision in **Krishna Kumar's Case.**

6. The learned Government Pleader however pointed out that the said decision turned on the special facts of the case. It was a case

where the petitioner therein a Music artist was appointed on 3.5.1997 after undergoing training for ten years. Training was over on 12.10.1996. From 12.10.1996 to 3.5.1997 the employee was paid only stipend though he was discharging the duties of a regular employee. Thereafter he was paid salary for the period from 12.10.1996 to 3.5.1997. Audit objection was raised after three years that the employee is not entitled to receive salary prior to the date of regularisation. Recovery was ordered. The petitioner therein contended that delay in regularisation was not on his account and the employer could not take advantage of the delay especially when the employee discharged the duties of a regular employee. The court held as follows:

> "Irregular payments are possible to be recovered and should be recovered. The audit procedure is intended to detect irregularities and omissions, the recommendations are to be duly taken notice of for setting right the mistake. They are also intended for future guidance and to suggest otherwise would be an encouragement to break down the system. If there are rules authorising recovery, it will bind the parties. That appears to be one side of the picture.

> When we independently examine the issue, it is possible to note that the rule should admit of exceptions as well. For instance, if an employee was required to shoulder higher responsibilities, consequent to the proceedings issued by the competent authority, later on when an error is found, it is not in any case automatic that the enhanced pay earned by him necessarily have to be regugled. It may be unjust in the present case, the circumstances highlighted would establish that the petitioner had been put to work as a Grade III Artist, which post carried a time scale. Only the admissible pay had been paid over to him. He was not a trainee. Therefore the contention that only stipend would be paid for the period may not be acceptable."

7. It is to be noted that another Division Bench of this court in **Santhakumari v. State of Kerala** (2005(4) K.L.T. 649) took the view that unless there is a statutory bar in recovering an amount, any amount paid by mistake can be recovered depending upon the facts and circumstances of each case. That was a case where challenge was raised against the order of the Government dated 25.6.1997 whereby the Government rejected the petition challenging the recovery of excess

amount paid to the petitioner from the pensionary benefits. The petitioner was working as High School Assistant and she attained the age of superannuation on 30.9.1993. Being a member of the teaching staff she was entitled to continue till the end of the academic year. She was entitled to only casual leave. The rule provided that if she applied for any leave other than casual leave during the period she continued beyond the age of superannuation the employee shall be retired from the service from the date of such application for leave. The petitioner in that case had applied for commuted leave for 9 days from 9.12.1993 to 17.12.1993 vide application dated 3.12.1993. Accordingly the order was issued treating that the petitioner retired from the date of application for leave, namely, 9.12.1993. The pay was re-fixed and liability certificate issued showing a liability of Rs.16,297/- being irregular payment of pay and allowances from 9.12.1993 to 31.3.1994. Petitioner was made liable to pay the excess amount drawn during the period from 9.12.1993 to 31.3.1994. The court took the view as follows:

> "Due to mistake if any amount is paid to an employee overlooking the statutory provision, employee should not

have received the amount since employee is also equally bound by the statutory provision. Employee should have refused the payment since payment was effected contrary to a statutory provision. Public interest shall not suffer due to mistake committed by an officer who has paid the amount and the person who has received the amount.

In our view, if an employee has received any amount contrary to a statutory provision the mistake is mutual since the administration as well as the employee is bound by the statutory provision. Paying and receiving the amount contrary to the statutory provision is illegal. When a mistake is mutual that has to be shared by both the parties. Law would nullify such an action if the parties are mistaken on the same fact situation. In a case where the mistake is mutual, both the parties act on the same mistake assumption. Person who pays the amount is on the legitimate belief that the person who receives the amount is entitled to receive it an the person who receives the amount is on the belief that he is entitled to receive the same. Mistake in such a situation in our view, is mutual. Consequently same has to be set right in public interest unless there is statutory bar in recovering the amount.

Principle laid sown by the learned Judge in Sivankutty Nair's Case (2005(3) K.L.T. 512) , in our view

> cannot be of general application. Reasoning of the learned Single Judge that the excess amount paid on account of wrong fixation of pay cannot be recovered unless the employee has in any way contributed to the mistake, in our view, is an over statement of law. We may hasten to add, unless there is statutory bar in recovering the amount, any amount paid by mistake could be recovered depending upon the facts and circumstances of each case. To hold that only in a case where employee has contributed to the mistake amount could be recovered cannot be sustained. Facts situation may warrant a sympathetic consideration but cannot be accepted as a general principle of law."

In this case it is clear that the petitioner was granted senior grade promotion, which was objected to on the ground that the method of appointment in the aided schools and Government schools are not same in terms of Decision No.2 below Rule 33 of Part I KSR. Thus payment received by the petitioner in this case was treated as contrary to the statutory provision contained in Decision No.2 below Rule 33 Part I KSR. The provisional service rendered by the petitioner in Government School cannot be reckoned as qualifying service for the

purpose of grant of time bound grade promotion as the method of appointment of a teacher in Government School and aided School are not identical. In such circumstances the principle enunciated by the Division Bench in **Santhakumari's Case** (supra) would apply and payment made to the petitioner must be treated as one contrary to the statutory injunction and apparently mistakenly by the authorities. Going by the Division Bench decision in **Santhakumari's Case** it may not be open to the petitioner to contend that there is no mistake committed by the petitioner in receiving the amount. The receipt of the money in question must be treated as contrary to the statute.

8. Then the only question is whether the petitioner can claim immunity from recovery on the basis that in the facts of this case recovery may be unjust. The petitioner was working as Headmistress at the time of the objectionable grant of the benefit. Of course the Division Bench has also taken the view that facts situation may warrant a sympathetic consideration but cannot be accepted as a general principle of law. In Ext.P2 it is stated that excess drawal of pay and allowances from 11.9.1991 to 31.7.1997 was approximately worked

out to Rs.18,000/-. The petitioner was given the benefit of senior grade with effect from 11.9.1991. Objection was raised by the Special Cell of the Accountant General as per communication dated 20.10.1997. Thus it can be seen that objection is seen raised much before the retirement of the petitioner and within a period of nearly six years from the date of grant of the benefit. In such circumstances, I feel that the petitioner has not made out a case for grant of any relief in this case.

The writ petition fails and it is dismissed.

(K.M. JOSEPH, JUDGE)

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K.M.JOSEPH, J.

O.P. No. 38521 OF 2002

JUDGMENT

05.09.2007.